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In the Supreme Court of the United States

No. 276

JAMES H. BLUNDELL, Executor of the Last Will and Testament of PATSY POFF, Deceased, JUANITA BLUNDELL, OLETA BLUNDELL and PATSEY BLUNDELL, Minors, JAMES H. BLUNDELL, Legal Guardian of said Minors, *Appellants*,

vs.

W. R. WALLACE, *Appellee*.

Brief of Appellee

BLANTON, OSBORNE & CURTIS,
W. L. FARMER,
(*of Counsel*)
Pauls Valley, Okla.

CICERO I. MURRAY,
Attorney for Appellee
(Lindsay, Okla.)

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In the Supreme Court of the United States

No. 788.

JAMES H. BLUNDELL, Executor of the Last Will and Testament of PATSY POFF, Deceased, JUANITA BLUNDELL, OLETA BLUNDELL and PATSY BLUNDELL, Minors, JAMES H. BLUNDELL Legal Guardian of said Minors, *Appellants.*

vs.

W. R. WALLACE, *Appellee.*

STATEMENT OF CASE

This cause originated in the District Court of Garvin County, Oklahoma, wherein appellee, W. R. Wallace, was plaintiff, and appellants herein were defendants. The purpose of the suit was to declare the will of Patsey Poff, a half-blood Choctaw Indian, void as to a one-third interest in her allotment, the said Wallace being the owner of said one-third interest by mesne conveyances from David H. Poff, the surviving husband of

Patsy Poff, deceased, who died on August 7th, 1916. The judgment of the trial court was in favor of plaintiff quieting the title of plaintiff as against the will of Patsy Poff, and decreeing said Wallace to be the owner of an undivided one-third interest in and to said lands mentioned in said petition, ten acres of same constituting a portion of the surplus allotment and the remainder constituting the homestead allotment of said Patsy Poff, deceased. Said cause was tried on a stipulation of facts and pleadings which appear in brief of appellants. The judgment of the trial court was sustained by the Supreme Court of the State of Oklahoma in an opinion handed down on October 9th, 1923, reported in 220 Pac. 40.

ARGUMENT AND AUTHORITIES

While appellants subdivide their argument under three heads we think the sole question involved in said appeal is whether or not Section 11224 Compiled Statutes of Oklahoma, as follows:

> "Every estate and interest in real or personal property to which heirs, husband, widow, or next of kin might succeed, may be disposed of by will: Provided, that no marriage contract in writing has been entered into between the parties; *no man while married shall bequeath more than two-thirds of his property away from his wife, nor shall any woman while married bequeath more than two-thirds of her property away from her husband;* Provided further, that no person who is prevented by law from alienating, conveying, or encumbering real property while living shall be allowed to bequeath same by will."

applies to the will of a half-blood Choctaw Indian as to her allotted lands. Said provision has been under consideration by the Oklahoma Supreme Court in the case of *Hill* v. *Buckholts*, 75 Okla. 196, 183 Pac. 42.

The question presented for determination in this case has never before been directly passed upon by this court.

It is contended by the appellee, and the decision of the trial court sustained such contention, that by virtue of the provisions of Enabling Act said section above quoted applies to the will of a half-blood Choctaw Indian who died since statehood. The deceased in the case at bar died in 1916.

By the Act of May 2, 1890, there was put in force in the Indian Territory, Chapter 155 of Mansfield's Digest of the Statutes of Arkansas, entitled "Wills and Testaments," Section 31 of said Act (26 Stat. 81) provides in part as follows:

> "That certain general laws of the State of Arkansas in force at the close of the session of the General Assembly of that state of eighteen hundred and eighty-three, as published in eighteen hundred and eighty-four in the volume known as Mansfield's Digest of the Statutes of Arkansas, which are not locally inapplicable or in conflict with this act or with any law of Congress, relating to the subjects specially mentioned in this section, are hereby extended over and put in force in the Indian Territory until Congress shall otherwise provide, that is to say, * * * 'to descents and distributions, Chapter forty-nine' * * * 'and to wills and testaments, Chapter one hundred and fifty-five'."

Section 2 of the Act of April 28, 1904 (33 Stat. 573) provides as follows:

> "All the laws of Arkansas heretofore put in force in the Indian Territory are hereby continued and extended in their operation, so as to embrace all persons and estates in said territory, whether Indian, freedmen, or otherwise, and full and complete jurisdiction is hereby conferred upon the District courts in said territory in the settlement of all estates of decedents, the guardianships of minors and incompetents, whether Indians, freedmen, or otherwise."

The above quoted provisions of the Congressional legislation embraces all that Congress had said relating to the making of wills by Indians, of whatever degree of blood, prior to the passage of the Acts of April 26, 1906, wherein it was provided:

> Sec. 23. Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein: *Provided*, that no will of a full-blood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse, or children of such full-blood Indian, unless acknowledged before and approved by a judge of the United States Court, or a United States Commisioner."

The importance of a correct determination

of this question cannot be overestimated, for the construction placed thereon by counsel for plaintiffs in error will have the effect of completely revolutionizing the established public policy of this state and of annihilating the protection that has been thrown around the home and family relationship by the beneficent provisions of the Constitution and statutes relating to the public policy of descent. For if this construction applies to a citizen of one-half Indian blood, it must necessarily also apply to a citizen of one-sixty-fourth Indian blood or one-one-hundred twenty-eighth, or even to the inter-married white citizen, who obtained, by virtue of his marriage and adoption into the tribe, the right of allotment. Such strained and technical construction casts them scot-free from the restraint which a wholesome public policy of this state has cast about a married person who attempts to dispose of his property by will.

Such restraint is wholesome and is founded upon a changed theory of law from the rights of married persons as such rights existed at common law. In this state the theory of separate and individual ownership of property is recognized to

the fullest extent, notwithstanding the marital relationship. The right of dower and of curtesy has been abolished and the spouse as such has no interest whatever in the sole and separate property of the other spouse during the lifetime of such other, but either party, though married, may sell and dispose of all of his property without let or hindrance even against the will and consent of the other spouse, and restrictions are placed around only the sacred homestead.

In construing legislation the court will search the mind of Congress and ascertain the evil which is sought to alleviate by its legislation. *Grayson* v. *Thompson*, 186 Pac. 236 (Okla.) *Tiger* v. *Western Investment Co.*, 221 U. S. 309, 31 Sup. Ct. 578, 55 L. Ed. 738. To enable this court to analyze and deduce the meaning of the language used by the Act of 1906, let us briefly allude to the contemporary historical conditions that existed, and the prior and subsequent law applicable thereto.

As hereinabove set out, by the Act of May 2, 1890, the law of wills and testaments and of descents and distributions of Arkansas was placed in effect. It has ever been a moot question wheth-

er or not by said act the law of wills applied prior to the Act of 1904 as to the Indians of the Choctaw and Chickasaw Nations, and in order to relieve the well founded doubt on this question, Congress enacted Section 2 of the Act of April 28, 1904, supra. At the time of the passage of said act, two systems of courts were attempting to mete out justice in the then Choctaw and Chickasaw Nations, one having jurisdiction over the persons, and property of white citizens, the other having jurisdiction over the persons and property of Indian citizens, with much confusion existing, and many serious questions arising as to jurisdiction, and under what system, when the rights of white persons and Indians became involved in the same litigation.

In a decision of the Court of Appeals of the Indian Territory rendered on October 4, 1901, in the case of *George* v. *Robb,* 64 S. W. 615, the second syllabus is:

> "Under the Ind. T. Ann. St. 1899, Sec. 3572 (Mansf. Dig. Ark. Sec. 6500), providing that a testator omitting to mention a living child shall be deemed to have died intestate as to such child, entitling it to a share of the estate, an intentional or accidental omission to mention a child, though not invalidating the will as to those men-

tioned, entitled such child to apply to the court for relief."

In construing the provisions of the above quoted law as to the will of a Creek citizen, the court applied the restrictions of the Arkansas law to said will.

In the case of *In Re Brown's Estate*, 97 Pac. 613, 22 Okla. 216, the State Supreme Court discussed the contemporary situation existing at said time, which discussion we deem pertinent to the background of the issues in this proceeding. We request that said decision be read by this court, and quote therefrom only the first and second paragraphs of the syllabus of said case, as follows:

"Chapters 49, 155 Mansf. Dig. (Ind. T. Ann. St. 1899, cc 21, 58), entitled 'Descents and Distribution,' and 'Wills and Testaments,' respectively, as modified by Acts of Congress (Act May 2, 1890 c 182, 26 Stat. 81; Act June 30, 1902, c. 1823, 32 State, 500) were in force in the Creek Nation on the 13th day of November, 1905."

"There being no children born to a non-citizen Creek allottee after the 25th day of May, 1901, she was entitled to dispose of her homestead by will, and such devise was subject to the limitation contained in Section 6500, Mansf. Dig. (Ind. T. Ann. St. 1899, Sec. 3572), which reads: 'When any person

shall make his last will and testament, and omit to mention the name of a child, if living, or the legal representatives of such child born and living at the time of the execution of such will, every such person so far as regards such child, shall be deemed to have died intestate, and such child shall be entitled to such proportion, share, and dividend of the estate, real and personal, of the testators if he had died intestate; and such child shall be entitled to recover from the devisees and legatees in proportion to the amount of their respective shares, and the court exercising probate jurisdiction shall have power to decree a distribution of such estate according to the provisions of this and the preceding sections."

It was thereafter determined by the Supreme Court of this state in the case of *Taylor* v. *Parker*, 33 Okla. 199, 126 Pac. 573, 235 U. S. 42, 35 Sup. Ct. 22, 59 L. Ed. 12, that, while the laws of Arkansas relating to wills applied to Indian citizens, yet said Indians were possessed of a certain class of property, to-wit, their allotments, which they were powerless to devise by will by reason of the fact that the making of a will constituted an alienation in violation of the Supplemental Agreement with the Choctaws and Chickasaws, providing that said property should remain inalienable during a certain period of time.

(See Act July 1, 1902, Sec. 1902, 36 Stat. 642). The second syllabus of said case is as follows:

> "The effect of the Act of April 28, 1904, (33 Stat. 573, C. 1824), was to make the laws of Arkansas theretofore put in force in the Indian Territory, applicable to another class of persons and estates, to-wit, Indians and their property, insofar as it was alienable under the Acts of Congress then bearing upon it. The extension of the law of wills enabled the Indian to devise all his alienable property by will made in accordance with the laws of the State of Arkansas, but did not operate to remove any of the restrictions theretofore placed upon lands of Indians by Act of Congress."

See also:

Hayes v. *Barringer*, 168 Federal 221 (C. C. A.)
Wilson v. *Greer*, 151 Pac. 629, 50 Okla. 387;
Chouteau v. *Chouteau*, 152 Pac. 373, 49 Okla. 105;
Reece v. *Benge*, 198 Pac. 493, 82 Okla. 69.

In the case of *Washington* v. *Miller*, 235 U. S. 422, 59 L. Ed. 295, this court, in discussing the situation relating to the descent of the lands of Creek citizens, said:

> "Before coming to the provisions of those acts, it may be helpful to refer to the situation existing at the time of their enact-

ment. Long prior thereto the Creek Nation had adopted laws of its own regulating the descent and distribution of property of its citizens dying intestate. Creek Laws of 1876, Sec. 6; Perryman's Compiled Creeks Laws of 1890, Sec. 6, p. 32, Sec. 8, p. 76; Bledsoe's Indian Land Laws, 2d Ed. Secs. 829-831. Congress also had dealt with that subject. By the Act of May 2, 1890 (26 Stat. at L 81, Chap. 182), Secs. 30 and 31, it had 'extended over and put in force in the Indian Territory' several general laws of the State of Arkansas, among which was Chapter 49 of Mansfield's Digest of 1884, relating to descent and distribution. At first the operation of this act was materially restricted by a proviso declaring that "the judicial tribunals of the Indian nations shall retain exclusive jurisdiction in all civil and criminal cases arising in the country in which members of the nation by nativity or by adoption shall be the only parties; and as to all such cases the laws of the State of Arkansas extended over and put in force in said Indian (425) Territory by this act shall not apply.' But the proviso lost much of its force when the Act of June 7, 1897 (30 Stat. at L. 83, Chap. 3), declared that 'the laws of the United States and the State of Arkansas in force in the (Indian) Territory shall apply to all persons therein, irrespective of race,' and was practically abrogated when the Act of June 28, 1898 (30 Stat. at L. 495) (Chap. 28), and provided (Chap. 26) that 'the laws of the various tribes or nations of Indians shall not be enforced at law or in equity by the courts of the United States in the Indian

Territory.' Of course, these congressional enactments operated to displace the Creek tribal laws of descent and distribution, and to substitute in their stead the Arkansas law as expressed in Chapter 49 of Mansfield's Digest."

In the case of *Taylor* v. *Parker, supra,* 235 U. S. 422, 59 L. Ed. 12, the court said:

"A further and distinct argument is based upon the act to provide for additional judges, etc., of April 28, 1904, Chap. 1824, Sec. 2, 33 Stat. at L. 572, to the effect that all the laws of Arkansas theretofore put in force in the Indian Territory are extended to embrace all persons and estates in said territory, whether Indians, freedmen, or otherwise, and full jurisdiction is conferred upon the District Courts in the settlement of all estates of decedents, and the guardianship of minors and incompetents, whether Indians, freedmen or otherwise. The Arkansas law of wills was a part of the law that thus had been adopted for the Indian Territory before 1904, and it is contended that the result of the above extension was to free the Indians from the restrictions so specifically imposed upon them in 1902. Of course, nothing of that sort was intended. As said below, the extension enabled 'the Indian to devise all his alienable property by will *made in accordance with the laws of the State of Arkansas,* but did not operate to remove any of the restrictions theretofore placed upon lands of Indians by Act of Congress.' That this was the understanding of Congress is

indicated by the Acts of April 26, 1906, Chap. 1876, Sec. 23, 34 Stat. at L. 137, 145, and May 27, 1908, Chap. 199, 35 Stat. at L. 312, giving Indians power to dispose of their allotments by will."

In the case of *Jefferson* v. *Fink,* 38 Sup. Ct. 516, 247 U. S. 288, the Supreme Court of the United States, in holding that the laws of Oklahoma had been substituted, by virtue of the Enabling Act and Constitution and Schedule thereto, for the laws of descent theretofore governing descent of allotments of Indians of the Five Civilized Tribes, said:

"By acts passed in 1890, 1893, 1897 and 1898, Congress manifested its purpose to allot or divide in severalty the lands of the Five Civilized Tribes with a view to the ultimate creation of a state embracing the Indian Territory; put in force in the territory several statutes of Arkansas, including Chapter 49 of Mansfield's Digest relating to descent and distribution; provided that those statutes should apply to all persons in the territory, irrespective of race; and substantially abrogated the laws of the several tribes, including those relating to descent and distribution. Acts May 2, 1890, c. 182, 26 Stat. 81, Sec. 31; March 3, 1893, c. 209, 27 Stat. 645, Sec. 16; June 7, 1897, c. 3, 30 Stat. 83; June 28, 1898, c. 517, 30 Stat. 495, Secs. 11 and 26. This was the situation when the Act of 1901, known as the Original Creek Agreement, was adopt-

ed. That act in the course of providing for the allotment in severalty of the lands of the Creeks revived their tribal law of descent and distribution by making it applicable to their allotment (Sections 7 and 28). But the revival was only temporary, for the Act of 1902, known as the Supplemental Creek Agreement, not only repealed so much of the Act of 1901 as gave effect to the tribal law but reinstated the Arkansas law with the qualification that Creek heirs, if there were such, should take to the exclusion of others. *Washington* v. *Miller*, 235 U. S. 422, 4250426 Sup. Ct. 119, 59 L. Ed. 295. The allotment in question was made and the tribal deed issued shortly after the Act of 1902 became effective. And this was followed by the Act of April 28, 1904, c. 1824, 33 Stat. 573, Sec. 2, declaring that all statutes of Arkansas theretofore put in force in the Indian Territory should be taken "to embrace all persons and estates in said territory whether Indian, freedmen, or otherwise."

"Referring to the purpose with which the Arkansas statutes were put in force in that territory and to their status there, this court said in *Shulthis* v. *McDougal*, 225 U. S. 561, 571, 32 Sup. Ct. 704, 707 (56 L. Ed. 1205):

> 'Congress was then contemplating the early inclusion of that territory in a new state, and the purpose of those acts was to provide, for the time being, a body of laws adapted to the needs of the locality and its people in respect to matters of local or domestic concern. There

doing no local Legislature, Congress alone could act. Plainly, its action was intended to be merely provisional.' * * * "

By the Enabling Act of June 16, 1906, c. 3335, 34 Stat. 267, provision was made for admitting into the Union both the Territory of Oklahoma and the Indian Territory as the State of Oklahoma. Each territory had a distinct body of local laws. Those in the Indian Territory, as we have seen, had been put in force there by Congress. Those in the territory of Oklahoma had been enacted by the territorial Legislature. Deeming it better that the new state should come into the Union with a body of laws applying with practical uniformity thoroughout the state, Congress provided in the Enabling Act (Section 13) that 'the laws in force in the territory of Oklahoma, as far as applicable, shall extend over and apply to said state until changed by the Legislature thereof,' and also (Section 21) that 'all laws in force in the territory of Oklahoma at the time of the admission of said state into the Union shall be in force throughout said state, except as modified or changed by this act or by the Constitution of the state.' The people of the state, taking the same view, provided in their constitution (Article 25, Sec. 2) that 'all laws in force in the territory of Oklahoma at the time of the admission of the state into the Union, which are not repugnant to this Constitution, and which are not locally inapplicable, shall be extended to and remain in force in the State of Oklahoma until they expire by their own limitation or are altered or repealed by law.'

> "The state was admitted into the Union, November 16, 1907; and thereupon the laws of the territory of Oklahoma relating to descent and distribution (Rev. Stat. Okla. 1903, c. 86, Art. 4) became laws of the state. Thereafter Congress, by the Act of May 27, 1908, c. 199, 35 Stat. 312, Sec. 9, recognized and treated 'the laws of descent and distribution of the State of Oklahoma' as applicable to the lands allotted to members of the Five Civilized Tribes."

It is manifest that at the time of enactment of Section 23, *supra*, Indians of the Five Civilized Tribes were wholly without capacity to alienate their allotments by will by reason of Congressional restrictions. We assert that the legislative intent of the Congressional Act of April 26, 1906, was not to revoke the policy that had been manifested in all of the legislation of Congress since 1890, of making the rights and property of Indian citizens of the United States subject to the local jurisdiction, but that Congress intended only to remove any barrier or restriction against the right of an Indian citizen of less than full-blood to dispose of his property, *including his allotment*, by will, subject, however, to the applicable provisions of the State law. In other words, it was the intent of Congress to place the Indian

citizen upon the same basis and to place his right to alienate by will upon the same foundation as the right to so alienate by the local white citizen. And as stated before, to hold otherwise will be to discard not only the clearly announced public policy of the State of Oklahoma, but will also be to discard the express public policy of Congress, in conferring the right of citizenship upon its Indian wards and its frequently expressed policy of subjecting these new citizens to the jurisdiction of local courts and local laws.

We are not unmindful of the fact that the State court has frequently manifested some temerity in announcing and following the general public policy of this state when the rights of Indian citizens were involved. Nor are we unmindful of the fact in an *obiter* expression by a commissioner of said court language inconsistent with the position taken by defendant in error above has been used. Nor are we unmindful of the fact that it is difficult at all times to keep in mind the rights of the two classes of citizens of the state. The line of demarcation as to the sphere of Congress and the sphere of the state is not always clear-cut, but the State Court in the case of *Burtschi* v. *Wolfe*, 198 Pac. 306, 82 Okla. 27, clear-

ly announced, we think, the correct doctrine as follows:

> "In reaching this conclusion we reject the premise assumed by counsel for the defendant in error that before an Indian is entitled to sell his lands, either inherited or allotted, we must be able to point our finger to some Act of Congress specifically authorizing such sale. In our judgment the opposite presumption is true. Indians, unless they are restricted, either in their person or their property, by some specific Act of Congress *or applicable state law*, have the same right to dispose of their property as white citizens of the state and of the United States. It is true that where either specific personal or property restrictions have been imposed by law, acts removing such restrictions must be liberally construed in favor of the Indians. But where there are no restrictions imposed by law the court is not justified in assuming their existence."

As was said in the case of *Tucker* v. *Leonard*, 76 Okla. 16, 183 Pac. 907, in discussing the effect of certain Acts of Congress placing in effect over Indian citizens the law of guardianship as the same exists in the State of Oklahoma:

> "It would appear that, when Congress gave the Probate Courts of Oklahoma full and complete jurisdiction over the person and estate of minors, it was intended that the laws of Oklahoma relating to guardians should apply. (Any other construction in

many instances would nullify the statutes of Oklahoma concerning the competency of persons for guardianship. The provisions of the Oklahoma statutes providing that the father, and in case of his death, the mother, being single, should have the preferential right to the guardianship of their minor children, would be denied; that is, in the case of the father not being a Creek citizen, though married to a Creek woman, by whom he had several children, and the father was dead. In the first instance mentioned, the father, under this provision of Section 4, *supra*, would not be qualified to act as guardian of his own children, notwithstanding he might in all other respects be entirely qualified; and in case of his death, the mother, notwithstanding her qualifications in every other respect, would not be competent. We cannot believe that it was ever intended for the section to go to that extent."

In the case of *Belt* v. *Bush*, 176 Pac. 935, --- Okla. ---, the State Court held that the allotment of a full-blood Indian descended to the heirs subject to the burden of the homestead right of the surviving wife, the fourth syllabus being as follows:

"The right of the surviving spouse to possess and occupy land occupied and used by the deceased spouse and family as a homestead under the provisions of Section 6328, R. L. 1910, applies to an allotment of a full-blood Indian of the Five Civilized Tribes

used and occupied by such Indian and her family as a homestead."

In the case of *Sperry Oil & Gas Co.* v. *Chisholm*, 282 Fed. 93, the court said:

> "In view of the Enabling Act, Sec. 21; Const. Art. 12, Secs. 1, 2; Rev. Laws, 1910, Secs. 1143, 3343, where a husband executes a renewal lease on the homestead embracing allotted lands, it is void under the Act of Congress, May 27, 1908, Secs. 1, 2, requiring leases of such land to be approved by the Secretary of the Interior, as the approval of the Secretary of the Interior, of a lease invalid under the law of Oklahoma, cannot give validity to the lease, *as both the state and federal laws are given full force and effect.*"

We have no contention to make or with counsel for appellants that, when Congress has expressed its will with reference to Indian citizens, any conflicting state statute must fall. The construction of the proviso to Section 11224 of Compiled Laws of 1921, as set forth in the case of *Walker* v. *Brown*, 43 Okla. 144, 141 Pac. 681, and *In Re Allen's Will*, 44 Okla. 392, 144 Pac. 1055, is undoubtedly a correct enunciation of the law with respect to the matters under consideration, for said proviso is in direct conflict with the plain provisions of the Act of 1906 as amend-

ed by the Act of 1908. Moreover, it is undoubtedly true that said act did not contemplate the operation of the proviso to said statutes as to Indian citizens who are specifically granted the right and authority by Congress to make wills, notwithstanding certain restrictions against alienation of their lands.

But we believe it unanswerable that Congress, having granted the right to Indian citizens to make wills, and having provided that the law of wills, of the State of Oklahoma "as far as applicable" and "except as changed or modified by this act" (Enabling Act), should apply to Indian citizens, had in mind the supervision of the state government as to the object of the testator's bounty. Would it be reasonable to contend that by virtue of the provisions of the Act of 1906 granting the authority to Indians to make a will that such Indians could legally make a will to a corporation in violation of Section 11225, Compiled Laws? Could it be contended with reason that Section 11254, Compiled Laws, requiring provision for after-born children has no field of operation as to Indian citizens by virtue of the blanket authority given under the

Act of 1906? Does Section 11255 of Compiled Laws making provision for children unintentionally omitted have no field of operation as to an Indian citizen? And if we are to look solely to the Congressional Act as to the right of an Indian to make a will, why should we require that said will comply in all respects as to attestation with the laws of the State of Oklahoma?

We believe that it was clearly the intent of Congress to give operation to both the federal and state law as to the making of wills by Indian citizens and unless state laws are clearly in conflict with the Federal Enactments, the courts should not hamper the public policy of the state, and, as we believe, the public policy of Congress, in subjecting Indian citizens and their property rights to the local jurisdiction and to local laws.

Prior to the Act of 1906 the Indian citizen was without power to alienate his allotment by will, which disability was by the Act of 1906 removed. The state statute is not in conflict with the right given to him by said Act for such Indian citizen can still enjoy said privilege. But if he makes a will, such will must be in compliance with the Oklahoma law and he must will one-third

of his property to his surviving spouse, and the other two-thirds of his property he may devise to whomsoever he may desire with no federal or state restriction.

Counsel for appellants rely solely for a decision of this case upon the case of *Blanset* v. *Cardin*, 261 Fed. 309, 256 U. S. 319, 41 Sup. Ct. 519, and to the case of *Brock* v. *Kiefer*, 59 Okla. 6, 157 Pac. 88. An analysis of these cases clearly eliminates them as persuasive authority on the question involved herein.

The case of *Brock* v. *Kiefer* was an opinion by the late COMMISSIONER COLLIER. The question of the validity of the devise was attempted to be raised by the husband on a contest of the probate of said will. The learned commissioner, in announcing and following the rule which has been enunciated repeatedly by the State Court, held that said question was not before the court because the only issue triable on an application to probate a will was the question of *devisavit vel non*. On page 91 he used the following language:

> "But the effect of said Section 8341 cannot legally be considered in passing upon a petition to probate a will, as the question

of the title to the property sought to be devised can in nowise arise or be determined in an application to probate a will, or in anywise affect the question of probate."

We are surprised that the commissioner, after so succinctly defining the issues presented by said record, should have gone further and discussed briefly the question involved in the case at bar. Doubtless the question was not briefed, or considered maturely by the court, for he bases his opinion upon the case of *Walker* v. *Brown*, 43 Okla. 144, 141 Pac. 681, which in nowise discussed the question in the case at bar, or the question alluded to by him.

An analysis of the case of *Blanset* v. *Cardin*, *supra*, demonstrates conclusively that it cannot act as an authority on which to predicate a decision in the case at bar. On the other hand, language is used therein which is favorable to the contentions of the appellee in this case.

The lands covered by said decision constituted the allotment of a Quapaw Indian, the title to which was evidenced by patent, reserving the title in the United States in trust for a period of twenty-five years. Prior to the Act of February 14, 1913, relating thereto (Compiled St. 4226)

said Indian was wholly without authority to alienate by will. It is to be noted first, that the act authorizing the making of said will was passed long after the Oklahoma laws became effective and applicable to the lands of Indians of the Five Civilized Tribes. In the second place, it is further to be noted that said act contained the following proviso:

> "Provided also that Sections 1 and 2 of this act shall not apply to the Five Civilized Tribes, or the Osage Indians."

In Section 1 of said act the Secretary of the Interior, as distinguished from the courts of Oklahoma, was given power upon notice and hearing, "*under such rules and regulations as he might prescribe,*" to ascertain the legal heirs of such decedent. Under Section 2, the Indian was given a right to dispose of his property by will "*in accordance with the regulations to be prescribed by the Secretary of the Interior.*" By a proviso to said section it is declared that, "*no will shall have any force or effect unless, and until, it shall have been approved by the Secretary of the Interior,*" and by a further proviso the Secretary of the Interior is given authority to "*approve or disapprove*" the will either "*before or after the death of the*

testator," and it is further provided that if "it *is subsequently discovered that there has been fraud in connection with the execution or procurement of the will, the Secretary of the Interior is hereby authorized, within one year after the death of the testator to cancel the approval of the will.* And it is further provided that the approval of the will and the death of the testator shall not operate to terminate the trust, but the Secretary of the Interior is given authority in his discretion to sell the land, notwithstanding the will and to apply the moneys, or so much thereof as may be necessary, for the benefit of the heir or heirs, etc. It was the plain provision of Congress, and the only reasonable construction that can be placed upon said act, that the laws of Oklahoma could have no field of operation as against the rights conferred upon said Indians and upon the Secretary of the Interior. And on this basis and for said reasons the Supreme Court of the United States affirmed the decision of the Circuit Court of Appeals.

However in said decision, without discussion by the Supreme Court of the United States, said

court quoted the assertion of appellants in said cause as follows:

> "The provision of the Code is determinative, appellant contends, because the law of descents and distributions' of Arkansas was made applicable to the the Indian Territory May 2, 1890 (26 Stat. 94, 95), and extended in its application in 1904 (33 Stat. 573), and, while at those times 'testamentary power had not been given to restricted allottees (the property in this case was restricted allotment and the period of restriction had not expired) of any tribe but promptly descended, as to all tribes, wherever located, according to the local law,' yet when Oklahoma was admitted as a state the Arkansas law was superseded by the Oklahoma Code. For this *Jefferson* v. *Fink*, 247 U. S. 288, 38 Sup. Ct. 516, 62 L. Ed. 1117, is adduced.'

Basing its ground for discarding said conclusion on the ground that the act above mentioned had been passed subsequently, the court further in said opinion said:

> "But against the contention and conclusion *the Act of Congress approved February* 14, 1913 (37 Stat. 678) *is opposed.*"

And thereupon the court analyzes said act to show that it is inapplicable by reason of its different provisions as above set forth.

Appellants suggest that the homestead allotment of this deceased is restricted Indian land

under the Act of Congress and that while 10 acres of the surplus is involved and the remainder of the land involved constitutes homestead there is a possibility of a distinction between the two allotments by reason of the fact that the surplus allotment is wholly unrestricted. We cannot believe that there is any distinction on this point for the question of the alienability of said lands is not called in question nor concerned in any way. Congress by its Act authorizing Indians to make wills dealt with both restricted and unrestricted lands and made the provision of the Oklahoma law "so far as applicable" apply to the wills of Indians conveying both restricted and unrestricted lands.

By Section 13 of the Enabling Act (34 Stat. L. 274) Congress provided "that the laws in force in the Territory of Oklahoma, so far as applicable shall extend over and apply to the said State until changed by the legislature thereof," and by Section 21 of said Act (34 Stat. L. 277) it provides,

> "And all laws in force in the Territory of Oklahoma at the time of the admission of said State into the Union shall be in force throughout said State except as modified or changed by this Act or by the Constitution of the State, and the Laws of the United

> States not locally inapplicable shall have the same force and effect within said State as elsewhere within the United States."

It would therefore seem from said provision of the Congressional enactment that the Congress definitely subjected the right of Indian citizens to make wills to the restrictions contained in the Oklahoma law.

Counsel for Appellants argue at some length that tht proviso to Section 23 of the Act of 1906, relating to the approval of wills of a full-blood Indians devising real estate is a restriction so far as applied to the case at bar. However the facts in controversy in this case in no manner involve the possible effects of the proviso to said section, and we deem that it is unnecessary to discuss what modicum of authority was retained by Congress by virtue of said proviso.

The opinion of the State Court in this case (220 Pac. 40) is a splendid expression of the public policy of the State and demonstrates a complete harmony between the public policy of Congress and the public policy of the State, and is founded upon an historical background which is compelling in its reasoning and in the final conclusion thereof.

We therefore conclude that the decision of the Supreme Court affirming the decree of the trial court, quieting the title of appellee, Wallace, in and to the undivided one-third interest in the lands mentioned in said petition is correct in principle; that Congress gave to the Indian citizen the right to make a will, subject, however, to the restraints of the Oklahoma law—not in conflict with the express provisions of Congress. and that Congress, having provided that the local law "so far as applicable" should apply to Indian citizens, among which laws was the law of Oklahoma relating to wills and to descent and distribution, this court should recognize the authority of the two jurisdictions and give effect to the Acts of each jurisdiction, in so far as they may not be in direct conflict, and should uphold the public policy of the State as to the devising of property away from the surviving spouse.

BLANTON, OSBORNE & CURTIS,
W. L. FARMER,
(*of Counsel*)
Pauls Valley, Okla.

CICERO I. MURRAY,
Attorney for Appellee.
(Lindsay, Okla.)

John B. Dudley